

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF TEXAS  
LUFKIN DIVISION

JESSE HERRERA	§	
VS.	§	CIVIL ACTION NO. 9:18-CV-21
WARDEN, RUFUS H. DUNCAN GERIATRIC FACILITY	§	

MEMORANDUM OPINION AND ORDER

Petitioner, Jesse Herrera, a prisoner confined at the Rufus H. Duncan Geriatric Facility with the Texas Department of Criminal Justice, Correctional Institutions Division, proceeding *pro se*, filed what appeared to be a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2241.

In this § 2241 petition, however, petitioner actually challenged the result of his prior § 2254 proceeding. A Report and Recommendation was entered on March 5, 2018, recommending the petition be denied as successive and unauthorized (docket entry no. 2). On October 18, 2018, an Order Overruling Objections and Adopting the Report and Recommendation was entered on October 18, 2018, (docket entry nos. 7 & 8). Petitioner filed a Notice of Appeal on December 14, 2018 (docket entry no. 11). On August 29, 2019, the Fifth Circuit Court of Appeals remanded the case for the limited purpose of allowing this Court to consider whether petitioner should be granted a Certificate of Appealability from the dismissal of his § 2241 petition.

After a review of the record in this case, the Court is of the opinion petitioner is not entitled to a certificate of appealability. An appeal from a judgment denying post-conviction collateral relief may not proceed unless a judge issues a certificate of appealability. *See* 28 U.S.C. § 2253. The standard for a certificate of appealability requires the petitioner to make a substantial showing of the denial of a federal constitutional right. *See Slack v. McDaniel*, 529 U.S. 473, 483-84 (2000); *Elizalde v. Dretke*, 362 F.3d 323, 328 (5th Cir. 2004). To make a substantial showing, the petitioner need not establish that he would prevail on the merits. Rather, he must demonstrate that the issues are subject to debate among jurists of reason, that a court could resolve the issues in a different

manner, or that the questions presented are worthy of encouragement to proceed further. *See Slack*, 529 U.S. at 483-84. Any doubt regarding whether to grant a certificate of appealability should be resolved in favor of the petitioner, and the severity of the penalty may be considered in making this determination. *See Miller v. Johnson*, 200 F.3d 274, 280-81 (5th Cir.), *cert. denied*, 531 U.S. 849 (2000).

In this case, petitioner has not shown that any of the issues would be subject to debate among jurists of reason. The questions presented are not worthy of encouragement to proceed further. Therefore, petitioner has failed to make a sufficient showing to merit the issuance of certificate of appealability. Accordingly, a certificate of appealability will not be issued.

**So Ordered and Signed**

Sep 10, 2019

A handwritten signature in black ink, appearing to read "Ron Clark", written over a horizontal line.

Ron Clark, Senior District Judge